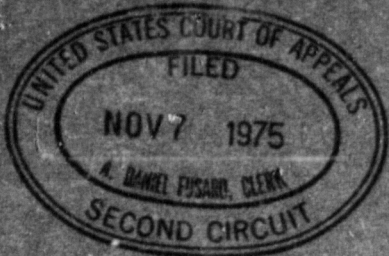


***United States Court of Appeals
for the Second Circuit***



**APPELLEE'S
PETITION FOR
REHEARING
EN BANC**



75-7308

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

L. BATLIN & SON, INC.,

Plaintiff-Appellee,

—v.—

JEFFREY SNYDER, d/b/a J.S.N.Y. and
ETNA PRODUCTS CO., INC.,

Defendants-Appellants.

APPELLEE'S REQUEST FOR REHEARING IN BANC

—and—

APPELLEE'S PETITION FOR REHEARING

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IN THE
UNITED STATES COURT OF APPEALS
For the Second Circuit

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L. BATLIN & SON, INC., :
 :
Plaintiff-Appellee, :
 :
v. : Appeal No. 75-7308
 : Decided October 24, 1975
JEFFREY SNYDER, d/b/a J.S.N.Y., :
and ETNA PRODUCTS CO., INC., :
 :
Defendants-Appellants. :
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APPELLEE'S REQUEST FOR REHEARING IN BANC

To the Honorable James L. Oakes, Thomas J. Meskill
and Ellsworth Van Graafeiland, Judges of the
United States Court of Appeals for the Second Circuit:

Plaintiff-Appellee* respectfully suggests that it is
appropriate that the rehearing requested in the attached
Petition be heard in banc under Rule 35 of the Federal Rules
of Appellate Procedure.

*Plaintiff-Appellee will be hereinafter referred to
as "Plaintiff" and Defendants-Appellants will be hereinafter
referred to as "Defendants."

1. Consideration by the Full Court is
Necessary to Maintain the Uniformity
of Decisions in the Second Circuit

There has always been a modicum of originality required to support a valid copyright. That is, that the "author" must contribute something more than a "mere trivial" variation, something recognizably "his own." This requirement has been reiterated in a continuous, uninterrupted succession of cases in this circuit and elsewhere. See pp.6376, 6377 of Judge Oakes' dissenting opinion. The majority, in the words of Judge Oakes in his dissent, "eviscerates this circuit's line of cases" by changing this requirement from originality to "physical skill" and "special skill, training and knowledge, and independent judgment" to create the mold from which the work is produced. Such a holding hardly conforms to the standard of copyrightability carefully built up by the long line of authoritative decisions emanating from this circuit.

Of course, it is this Court's prerogative to depart from its prior rulings. However, it is submitted that such a drastic departure, having such a serious impact on commerce, should only be effectuated by this Court sitting in banc.

2. The Present Cause
Involves a Question of
Exceptional Importance

The majority has taken the position of "progress now, litigate later." In other words, allow registration of the copyright now, and "let the courts determine which party is entitled to damages should it find infringement." It is no wonder that Judge Oakes was moved to admonish in his dissenting opinion at p. 6374 that:

The majority opinion cheapens copyrights
(and the concept of copyright protection)
by making them meaningless, supposedly in
the name of "progress in the arts."

The majority opinion has the undesirable effect of permitting the copyrighting of slavish copies of any work in the public domain as long as it is produced by a means requiring physical skill. This would allow the owner of such a copyright to preclude the sale of the original work itself or an independent copy thereof by injunction or by taking advantage of the registration provisions of the Customs Law, until such time as the matter could be litigated to determine the trivial creative increment covered by the copyright. Surely such a result was never contemplated by the Copyright Law. The proper resolution of this question is therefore a question of exceptional importance and one making a rehearing in banc appropriate.

The points of law and fact which in the opinion of Plaintiff-Petitioner the court has misapprehended, and the argument in support of a rehearing is attached hereto in the Petition for Rehearing.

Respectfully submitted,

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APPELLEE'S PETITION FOR REHEARING



IN THE
UNITED STATES COURT OF APPEALS
For the Second Circuit

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L. BATLIN & SON, INC.,	:	
	:	
Plaintiff-Appellee,	:	
	:	
v.	:	Appeal No. 75-7308
	:	
JEFFREY SNYDER, d/b/a J.S.N.Y.,	:	Decided October 24, 1975
and ETNA PRODUCTS CO., INC.,	:	
	:	
Defendants-Appellants.	:	
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APPELLEE'S PETITION FOR REHEARING

To the Honorable James L. Oakes, Thomas J. Meskill
and Ellsworth Van Graafeiland, Judges of the United
States Court of Appeals for the Second Circuit:

Comes now the Plaintiff-Appellee* in the above-
entitled case, and respectfully prays the Court to grant a
rehearing.

*Plaintiff-Appellee will be hereinafter referred to
as "Plaintiff" and Defendants-Appellants will be hereinafter
referred to as "Defendants."

1. The Majority Misapprehended the Degree of Originality Required to Sustain a Valid Copyright

The majority states at p. 6370 that:

By originality, the process of the creation is analyzed, and the item is not subject to copyrightability unless it had been constructed by a process requiring independent skill, labor and judgment of an individual. [Emphasis supplied.]

and then goes on to state at p. 6371 that:

It is still requisite that * * * originality of process, exist, for a reproduction of a work of art to merit copyright protection. [Emphasis supplied.]

It is submitted that this requirement of originality as formulated by the majority evidences both a misapprehension of the "originality" necessary to sustain a valid copyright and a departure from the law as it has been understood in this circuit, as well as elsewhere.

Although the majority cited Gardenia Flowers, Inc. v. Joseph Markowits, Inc., 280 F.Supp.776 (SDNY, 1968), in support of its position, it overlooked the criteria used by that court for determining originality. The Court stated at 280 F.Supp. 781-782:

They [the arrangements of plastic flowers] also are lacking in originality, and it is elementary that no work is entitled to copyright protection unless it is " * * * original, in that the author has created it by his own skill, labor, and judgment. [emphasis supplied.]

It is noteworthy that the court there spoke of the creation as opposed to the "process of the creation" used in the majority's opinion. That same concept was succinctly analyzed by the court in Kuddle Toy, Inc. et al. v. Pussycat-Toy Co., Inc., reported only at 183 USPQ 642 (EDNY, 1974), where the court stated at 183 USPQ 659:

It is not necessary to accept the idea that some modest degree of excellence, of manifested talent is necessary; these are debatable matters and the national tradition is to shrink from giving to any public authority the power to make judgments on excellence or aesthetic validity, and on that basis to grant or withhold judicial relief. The critical consideration is whether or not the copyright owner is the author of that for which he has claimed copyright. Judge Levet was clear, as is the statute, that the copyright claimant was not the author of the flower arrangement or of any of the components - a non-copyrightable mass of non-copyrightable elements.

The danger inherent in the majority's formulation of the test of originality requisite to sustain a valid copyright is that, using such a test, any copy of any work which employs the molding process would be copyrightable, since a mold maker must use skill and labor in making a mold. The key which appears to have been overlooked by the majority is that the required skill must contribute to the work and be more than merely trivial variation. Here, the skill used in the "process of the creation" did not contribute to the

originality of the work or elevate it from a mere trivial variation of a work in the public domain.

The test previously used by this circuit has been used in many others. In Donald v. Zack Meyer's T.V. Sales and Service, et al., 426 F.2d 1027 (CA5,1970), the court stated at 426 F.2d 1030:

* * * Nevertheless, something more than merely refraining from outright copying is required before a new variation on an old work has sufficient originality to be copyrightable. The author must add "some substantial, not merely trivial, originality." Chamberlin v. Uris Sales Corp., 2 Cir. 1945, 150 F.2d 512, 513, 65 USPQ 544. The variation must be meaningful and must result from original creative work on the author's part. Amsterdam v. Triangle Publications, Inc., 3 Cir. 1951, 189 F.2d 104, 89 USPQ 468; Andrews v. Guenther Publishing Co., S.D.N.Y. 1932, 60 F.2d 555; Jeweler's Circular Publishing Co. v. Keystone Publishing Co., 2 Cir. 1922, 281 F. 83, cert. denied, 259 U.S. 581, 42 S.Ct. 464, 66 L.Ed.1074; McIntyre v. Double-A Music Corp., S.D. Cal.1959, 179 F.Supp.160, 124 USPQ 27; Alva Studios, Inc. v. Winninger, S.D. N.Y. 1959, 177 F.Supp. 265, 123 USPQ 487; Smith v. George E. Muehlebach Brewing Co. W.D.Mo. 1956, 140 F.Supp. 729, 110 USPQ 177. * * *

In Kuddle Toy, Inc. v. Pussycat-Toy Co., Inc., supra, at 183 USPQ 657, the court focused on the issue, stating:

The language [of the Copyright Act] does not mean, without impossibly strenuous interpretation, that the applicant may be the author of a trifling variation, perhaps the result of imperfect copying, of some other man's work of art. Copying is not authorship of what is copied.

The foregoing illustrates that the standard of originality calling for a contribution that is more than a mere trivial variation, has been the touchstone of the law of determining copyrightability in this circuit and elsewhere. Consequently, the majority has radically departed from the standard which has heretofor been used throughout the circuits.

2. The Majority Misapprehended the
Testimony of Plaintiff's Expert

The majority opinion states on p. 6370:

* * * From the record, it appears that witnesses for both parties concede that the sculptor needed special skill, training and knowledge, and independent judgment to create the mold * * * There was no slavish or mechanical copying.

It is respectfully submitted that there was no such concession on the part of plaintiff's expert. Far from it, plaintiff's expert witness testified that there was no degree of originality existing in defendants' bank over the one in the public domain, that defendants' bank was only a mere copy, and that there was little change between the two [A-53 to 55]*. Whatever changes were made were made to facilitate the production of defendants' bank; that is, any changes were utilitarian. [A-56 to 57]. In summary, defendants' bank is a reproduction of the public domain bank with trivial variations, made as

*References to the Joint Appendix will be indicated as "[A-]."

simple as possible for purposes of manufacture, the maker needing minimal skill, and no more than a direct copy with proportionate changes in size [A-57 to 58]. None of the trivial differences were unique or artistic or required any degree of originality [A-86].

From an examination of the full testimony, plaintiff's expert concludes that the only departures from the original bank were those necessary to reduce its size and to facilitate the use of plastic instead of metal. Surely, such changes do not meet the standard of originality as heretofor required by the courts in past decisions.

3. The Majority Misapprehends the Purpose of the Copyright Law

The majority opinion states on p . 6366:

A copyright becomes akin to a notice or a claim for priority amongst creditors. The claims can be staked out rapidly so that articles of culturally perishable content can rapidly enter the stream of commerce. Thus it is possible for one valid copyright to infringe upon another valid copyright. See infra.

If this were so, a claimant owning a copyright on a work which contained an insignificant change from a work in the public domain could register the same with the United States Customs Bureau and effectively exclude entry of the public domain work,

at least until the machinery for contesting the exclusion had run its course. It should be borne in mind that Customs refused entry of plaintiff's metal banks on the strength of defendants' registration of their copyright on their "different" plastic bank [A-25]. Since the majority recognizes the fleeting qualities of works of this type, such limited exclusion is all that is necessary pragmatically to establish a monopoly for the duration of the life of the work.

Furthermore, it is not the purpose of the Copyright Law to allow an infringer to copyright his infringing work. In Ferris v. Frohman, 223 U.S. 429 (1911), an adaptation of a play which "differed from the original in various details but not in its essential features" was copyrighted. The complainants who owned the original sought to enjoin the adaptation. The owner of the adaptation claimed the copyright gave him the rights to the adaptation. The court held that the infringer's play

*** was substantially identical with that of the complainants [and] was simply a piratical composition. It was not the purpose or effect of the copyright law to render secure the fruits of piracy, and the [infringer] *** is not entitled to the protection of the statute. In other words, the claim of Federal right upon which he relies is without merit.

The same result would occur in the case at bar if the original bank were a new work. Defendant's bank would be nothing more than a piratical copy, not entitled to copyright protection. If defendants' trivial changes entitled them to a copyright, then every copyright of a work of art would be meaningless. Anyone could then produce a copyrightable work by making such minor, trivial changes as defendants have made here and claim that such changes entitle them to copyright protection. It is submitted that such was not the intent of the Copyright Law.

4. Conclusion.

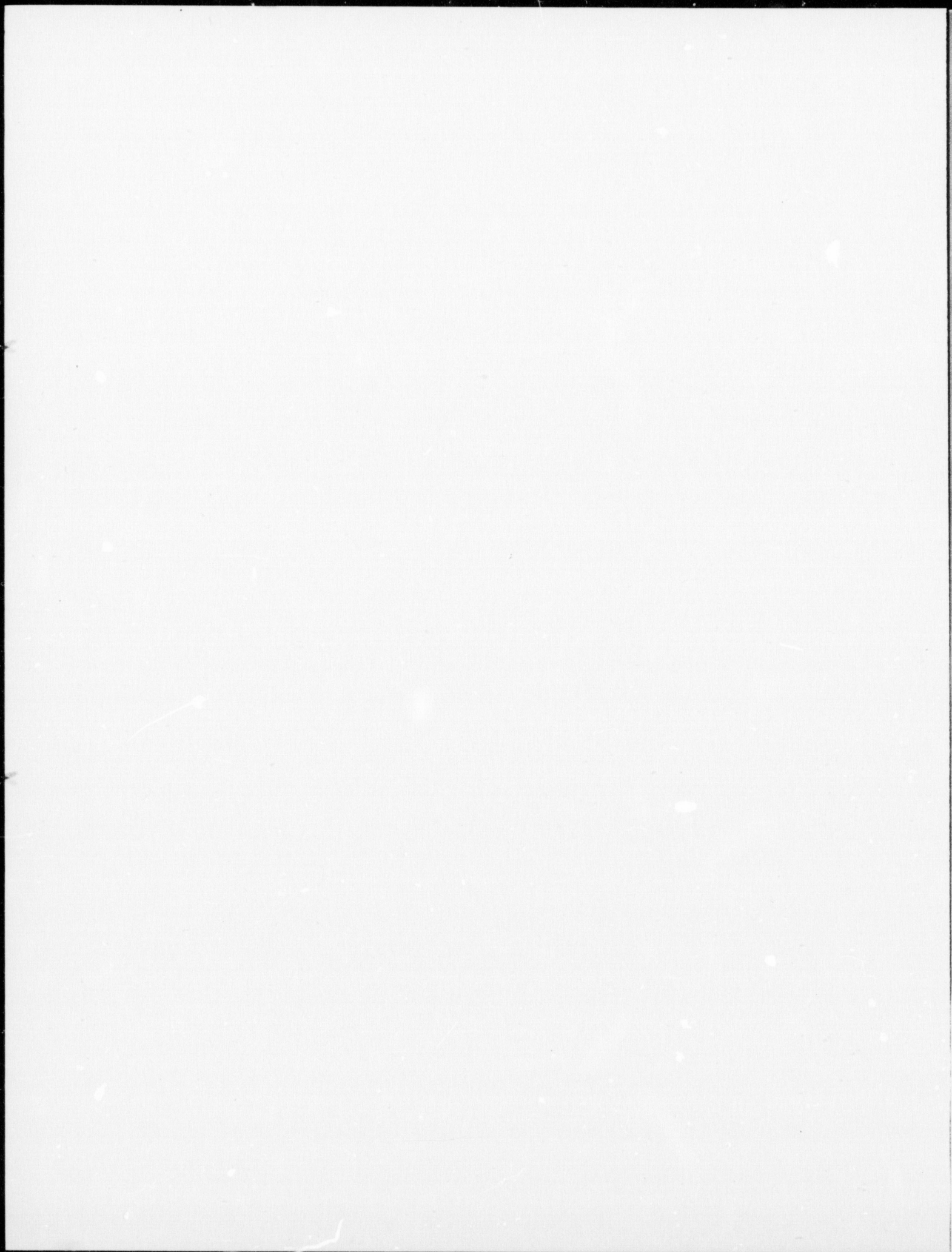
In view of the far-reaching importance of the majority's radical departure from the settled law, this Petition for Rehearing should be granted, and the case should be set down for reargument on the regular calendar. As previously stated, it is respectfully suggested that, pursuant to Rule 35 of the Federal Rules of Appellate Procedure, it would be eminently appropriate for this case to be heard in banc, to the end that the important

questions of copyright law which are left in doubt
by conflict of the majority decision with the previous
decisions of the circuit may be authoritatively
resolved.

Respectfully submitted,

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